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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1437

RICHARD P. MUCIE, D. O.,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

AND

APPLICATION FOR RECONSIDERATION OF APPLICATION FOR RELEASE ON BAIL PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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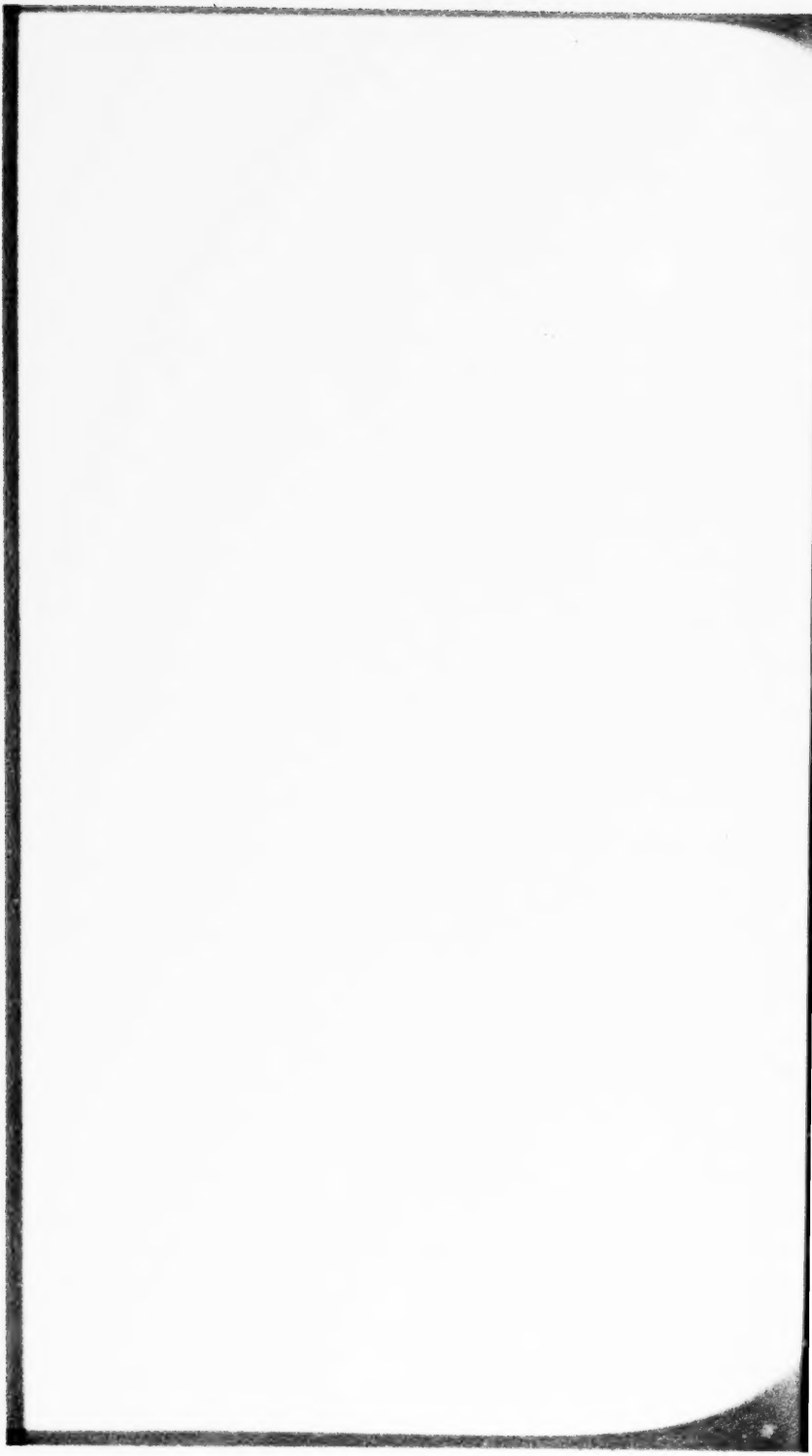

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STATE OF MISSOURI,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Richard P. Mucie, D. O., by and through his attorneys of record, presents his Petition for Writ of Certiorari to the Supreme Court of Missouri, and states:

(a) OPINION BELOW

The opinion of the Supreme Court of Missouri, Division No. One, filed January 12, 1970, is reported as *State v. Mucie,* 448 S.W.2d 879. A copy of that opinion is set out in the Appendix hereto.

(b) GROUNDS FOR JURISDICTION

Petitioner seeks to have reviewed the decision and opinion of the Supreme Court of Missouri affirming the judgment, sentence and conviction of Petitioner of the offense of manslaughter by abortion, a felony under the laws of Missouri, dated January 12, 1970. No petition for rehearing or for transfer to the court en banc was filed for the reason that divisional opinions are final judgments and under the practice and procedure of the Supreme Court of Missouri, petitioners would not be entitled to such a rehearing or transfer as a matter of right. This petition is presented under the authority of *Section 1257, Title 28, United States Code,* and within the time prescribed by *Rules of the Supreme Court, Rule 22, Title 28, United States Code.* A certified record in the Supreme Court of Missouri has been requested.

(c) QUESTIONS PRESENTED FOR REVIEW

(1) The validity of a statute of the State of Missouri which Petitioner believes to be repugnant to the Constitution of the United States, and which Petitioner would urge violates the rights, privileges and immunities granted Petitioner under the Constitution of the United States; in that

(i) *Section 559.100, R.S.Mo., 1959,* a copy of which is set forth herein below, is without appropriate standards by which it can be determined when and under what circumstances an abortion is illegal as not being "necessary to preserve (the mother's) life or that of an unborn child," and does not and did not therefore advise the Petitioner of the nature and cause of the accusation against him in violation of the *Fifth Amendment to the United States Constitution.*

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(ii) *Section 559.100, R.S.Mo., 1959,* also provides that where anyone, including the Petitioner, shall commit or attempt to commit an abortion, "shall, in event of the death of said woman or any quick child, whereof she may be pregnant, being thereby occasioned, upon conviction be adjudged guilty of manslaughter." Petitioner would urge that such a provision is so vague and indefinite that it violates the due process clause of *Section 1 of the Fourteenth Amendment to the United States Constitution,* in that it does not require that the abortion or attempted abortion be the proximate cause of the death or that the death even be connected with the acts of the defendant and provides for guilt regardless of the care and skill used in the performance of the abortion.

(iii) *Section 559.100, R.S.Mo., 1959,* denies Petitioner, a licensed physician, equal protection under the law in violation of *Section 1 of the Fourteenth Amendment,* in that it establishes a double standard of guilt.

(iv) *Section 559.100, R.S.Mo., 1959,* is an unconstitutional denial of the prospective mother's constitutional right to privacy as guaranteed by the *First, Fourth, Fifth, Ninth and Fourteenth Amendments.*

(v) *Section 559.100, R.S.Mo., 1959,* infringes upon the privileges and immunities of the Petitioner, as a duly licensed physician, to exercise and perform his duties and functions to abort pregnancies when otherwise necessary for the health and well being of his patients even though it is not necessary to save the mother's life, all in violation of *Section 1 of the Fourteenth Amendment.*

(vi) *Section 559.100, R.S.Mo., 1959,* is unconstitutionally vague, indefinite, illogical and confusing in that it exempts abortions where such would be necessary to preserve the life of the unborn child, when an abortion

will of necessity prevent the birth or life of the unborn child.

(vii) *Section 559.100, R.S.Mo., 1959,* violates the *Ninth Amendment* in that the decision of whether or not to abort or otherwise terminate an unquickened fetus is the decision of the mother and not of the State, and of her right to choose whether to bear children or not.

(2) Whether or not the Supreme Court of Missouri was correct, under due process, in holding that the Petitioner did not have standing to attack the constitutionality of *Section 559.100, R.S.Mo., 1959.*

(d) CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when

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in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Ninth Amendment to the United States Constitution:

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Fourteenth Amendment to the United States Constitution, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 559.100, Revised Statutes of Missouri of 1959:

Any person who, with intent to produce or promote a miscarriage or abortion, advises, gives, sells or administers to a woman (whether actually pregnant or not), or who, with such intent, procures or causes her to take any drug, medicine or article, or uses upon her, or advises to or for her the use of, any instrument or other method or device to produce a miscarriage or abortion (unless the same is necessary to preserve her life or that of an unborn child, or if such person is not a duly licensed physician, unless the said act has been advised by a duly licensed physician to be necessary for such a purpose), shall,

in event of the death of said woman, or any quick child, whereof she may be pregnant, being thereby occasioned, upon conviction be adjudged guilty of manslaughter, and punished accordingly; and in case no such death ensue such person shall be guilty of the felony of abortion, and upon conviction be punished by imprisonment in the penitentiary not less than three years nor more than five years, or by imprisonment in jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment; and any practitioner of medicine or surgery, upon conviction of any such offense, as is above defined, shall be subject to have his license or authority to practice his profession as physician or surgeon in the state of Missouri revoked by the state board of medical examiners in its discretion.

(e) STATEMENT OF THE CASE

The Petitioner was originally convicted after a trial by jury of the felony offense of manslaughter by abortion under *Section 559.100, R.S.Mo., 1959,* and was sentenced to ten years imprisonment. Upon direct appeal, the Supreme Court of Missouri affirmed that conviction.

Petitioner was a licensed and practicing osteopathic physician in Kansas City, Missouri. Nancy Ward was a student at the University of Oklahoma and while there began to date Fred Landreth. This dating led to an engagement and this engagement eventually led to her pregnancy. When this was discovered, Nancy and Fred discussed the situation and Nancy even contemplated suicide in order to hide her shame, but finally Nancy and Fred decided to secure an abortion. They enlisted the aid of Fred's father, Ed Landreth.

It was the State's evidence that Ed called Petitioner on January 30, 1968 and told him of his son's "problem", which his son advised arose about the middle of October.

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Petitioner advised Ed that it was too late to solve the problem. Fred, upon learning this, then advised his father who relayed the information to Petitioner, that Nancy was only thirteen or fourteen weeks pregnant. She was in fact twenty one weeks pregnant. Petitioner requested that Nancy see him on February 7th. On that day Nancy and Fred visited Petitioner's office, paid him $400.00, and after an all night vigil, Petitioner advised Fred that Nancy had suffered a heart attack, was in shock and had been taken to a hospital. Nancy was dead before she arrived at the hospital.

The police were notified and a portion of fetus was removed from the uterus of the body. A detective, without benefit of a search warrant and in the Petitioner's absence, searched his office and surrounding area and seized from his trash can a part of a fetus. When questioned, Petitioner advised the Coroner he had treated Nancy for chest pains, nervousness and a possible cardiac condition. The pathologist testified as to the pregnancy that the uterus had been evacuated in an unusual fashion and had been perforated, which led to hemorrhaging and ultimately to death from shock.

The defense evidence was that the phone calls from Ed Landreth took place and that Petitioner did agree to examine Nancy. He did so, and finding her to be over four and one half months pregnant, advised her that the pregnancy could not be terminated. Nancy stated that this would "kill her father" and threatened suicide. Later that night, Nancy and Fred returned to his office. She was hysterical and had apparently attempted to abort herself. Petitioner then sterilized the area, removed the protruding placenta and fetus, gave her medication and performed a curettement. Nancy continued to digress and died before she could be taken to a hospital. There was

other expert evidence that the Petitioner had rendered proper treatment under those circumstances.

Prior to trial, Petitioner filed a motion to dismiss the indictment for the reason that *Section 559.100* was "unreasonable, discriminatory, invalid and unconstitutional" and violated due process, equal protection and the right of privacy (Tr. 4-5). Upon appeal, the Petitioner raised the point that the statute violated due process because it was unreasonable, discriminatory, vague and indefinite and violative of the right of privacy. The Supreme Court of Missouri held that "the posture of appellant's case does not present nor involve issues entitling him to a determination of his alleged constitutional question." (Opinion p. 9).

(f) ARGUMENT

The federal constitutional question was raised at the very onset of the case and preserved upon appeal. Yet the Supreme Court of Missouri, upon appeal, held that the Petitioner was not in a position to attack the constitutionality of the statute because, although the State's evidence was that he had committed the abortion, Petitioner claimed only that he had "cleaned up" after a partial abortion and therefore his defense did not go to the statutory exception of "unless the same is necessary to preserve her life."

The difficulty with the position of the Missouri Supreme Court is that Petitioner's attack went to the statute itself, that the exception "necessary to preserve life" did not set up constitutional standards, that abortion laws themselves are unconstitutional, that this one in particular is unconstitutionally vague and indefinite, and that since the statute was unconstitutional his conviction under it could not stand.

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Abortion laws, which are generally similar to the Missouri statute, have been under wide and varied attack in recent years. The Supreme Court of California in *People v. Belous,* (Cal. 1969) 458 P.2d 194, held the California statute unconstitutional because the term "necessary to preserve" was not capable of sufficient meaning to satisfy due process requirements. This Court recently refused to overturn this decision upon appeal by the State. (*Order entered February 24, 1970.*) The United States District Court for the District of Columbia in *United States* v. *Vuitch* (decided November 10, 1969), in finding a similar law unconstitutionally vague, also pointed out that such laws infringe upon a "woman's right to avoid childbirth for any reason," invaded the right of privacy, interfered with the proper practice of medicine, and denied due process by assuming guilt on the part of a physician whose professional judgment should not be challenged. The United States District Court for the Eastern District of Wisconsin in *Babbitz* v. *McCann* (decided March 5, 1970) held the Wisconsin abortion law unconstitutional under the *Ninth Amendment* because it is the decision of the mother and not of the state as to whether to abort an unquickened fetus, and that the state, whose duty and power goes to the protection of people and property, does not have sufficient legitimate interest to prohibit the abortion of an unquickened fetus which is not a person, but is but a part of the consenting mother.

This Court in *Griswold* v. *Connecticut,* 351 U.S. 479, 14 L.ed.2d 510, 85 S.Ct. 1678, held that the practices of and in the bedroom are free from examination by the state. Petitioner believes that if a law prohibiting contraceptives is an unconstitutional invasion of privacy, then a law that prohibits the abortion of an unquickened fetus is likewise unconstitutional. It is just a matter of timing.

On the other-side-of-the-coin, the Supreme Court of New Jersey, likewise confronted by a similar statute, upheld it against the void for vagueness attack in *State* v. *Moretti*, (N.J. 1968) 244 A.2d 499.

The Petitioner's cause thus involves a federal question of substance not heretofore determined by this Court, but upon which the lower courts are increasingly being confronted and upon which these same lower courts seem to be thrashing about in a sea of discord and confusion. With the changing morals of our ever expanding society, the "problem" confronting Nancy Ward is becoming more and more the rule instead of the exception. Should Nancy and girls in her position be confronted with a problem with only two legal answers, shotgun wedding or a life of shame. Or should a third alternative be available—legal abortion under professional care. By what right does a state interfere with her freedom of choice to be a mother or not to be. Some states, including Kansas, have repealed or modified their abortion laws so as to grant girls like Nancy that third alternative. All agree the question presented here is a vital and moving social problem involving the very heart of a prospective mother and her physician. If these statutes are constitutional, then this Court should say so. If they are not, then a decision by this Court should once and for all say so and relieve girls like Nancy, boys like Fred, and doctors like Petitioner from the agony of indecision.

Finally, let us look at *Section 559.100* and examine it more closely. This statute, like all these others, use the exception "unless the same is necessary to preserve her life or that of an unborn child." Only a doctor can determine when an abortion is necessary to preserve the mother's life, yet a jury or judge is allowed to make this determination under this statute. Even doctors disagree.

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What is necessary in one case may not be necessary in another. If an abortion is performed and the mother lives, can anyone with any degree of accuracy say that the abortion actually saved her life, or would she have lived anyway. Medical science is not that exact. Also, how can an abortion preserve the life of an unborn child. If the meaning of abortion covers a situation where the child can live, it would appear that caesarean and breach births are prohibited. If necessary to preserve life means only where it is absolutely required in order to prevent death, then a doctor, in assisting a woman having a miscarriage violates this statute. For each of these operations involves the use of drugs, medicines and instruments, the use of which is prohibited by *Section 559.100*.

The exception in *559.100* is in two parts. First, where it is actually necessary to preserve life, and second, if the abortion is performed by a person who is not a licensed physician, then it is not illegal if the abortion "has been advised by a duly licensed physician to be necessary for such a purpose" whether it is in fact necessary to preserve life or not. Here, the Petitioner, who is a licensed physician, was required to be correct in his analysis that it was necessary to preserve life (regardless of his medical judgement) but as to persons who are not doctors, the standard is not so exact. Double standard—denial of equal protection. A layman is much better off than the professional.

Finally, the statute makes the aborter guilty of manslaughter if, at any time after the abortion "being thereby occasioned" the woman dies. Whether the occasion refers to the death of a quick child, or to the event of her own death, or to the occasion of the abortion, is not clear. But even assuming it refers to the "occasion of the abortion", it would appear that the Petitioner would be guilty of man-

slaughter if Nancy Ward, in leaving his office was struck and killed by an automobile outside his door, or if her enraged father had entered during the abortion and had shot her. Due process certainly requires some type of causal connection between the prohibited act and the death.

As was held in *Lanzetta* v. *New Jersey*, 306 U.S. 451, 83 L.ed. 888, 59 S.Ct. 618, no one should be required at peril of life, liberty and property to speculate as to the meaning of penal statutes.

CONCLUSION

Petitioner respectfully submits that his Petition for Writ of Certiorari to the Supreme Court of Missouri should be granted and that this Court should hold that *Section 559.100, R.S.Mo., 1959* is repugnant to the Constitution of the United States and that the Petitioner should be discharged.

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APPLICATION FOR RECONSIDERATION OF APPLICATION FOR RELEASE ON BAIL PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

Comes now the Petitioner and moves this Honorable Court, or a Justice thereof, for an order under the authority of *Rules of the Supreme Court, Rule 27, Title 28, United States Code,* reconsidering the Petitioner's previous application for release on bail pending disposition of petition for Writ of Certiorari, and order Petitioner's release upon such reasonable bail, and in support thereof, states:

1. That on or about January 23, 1970, Petitioner filed herein his Application for Bail Pending Certiorari which was hurriedly drawn and filed in an effort to allow the Petitioner free on bond.

2. That thereafter, and on the 30th day of January, 1970, Mr. Justice White denied said application.

3. That thereafter said application was referred to the Court, and was on the 27th day of February, 1970, denied.

4. That Petitioner would refer the Court to and incorporate herein the statements, arguments and allegations contained in his Petition for Writ of Certiorari to the Supreme Court of the United States, to which this Application is appended.

5. That the Petitioner is a duly licensed osteopathic physician with property and assets and is not likely to abscond or fail to appear when ordered.

6. That the Petitioner was at all times prior to the affirmance of his conviction by the Supreme Court of Missouri free on bond and that thereafter Petitioner, in com-

pliance with the mandate, surrendered himself into custody.

7. That the Petitioner is now in custody.

8. That Petitioner would urge the Court to reconsider its previous denial of bail in light of the presentation made in the Petition for Writ of Certiorari now presented to the Court.

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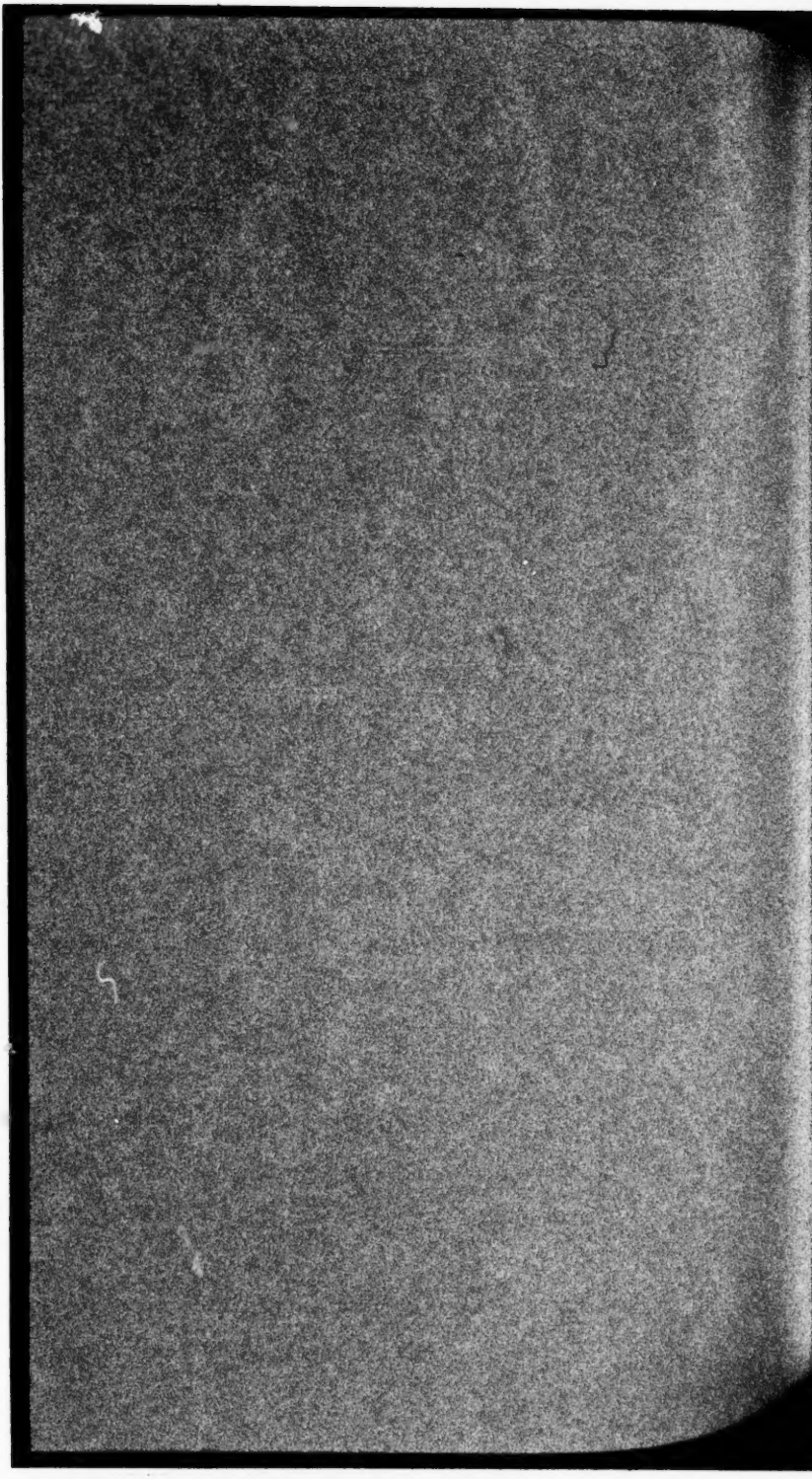

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IN THE

SUPREME COURT OF MISSOURI

DIVISION NUMBER ONE

STATE OF MISSOURI, Respondent,
vs
DR. RICHARD P. MUCIE, Appellant.

No. 54,317

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
THE HONORABLE PAUL E. VARDEMAN, JUDGE

(Filed January 12, 1970)

Dr. Richard P. Mucie, a licensed osteopathic physician and surgeon, was convicted by a jury of manslaughter by abortion; his punishment was assessed at 10-years' imprisonment in custody of the Department of Corrections, and sentence and judgment were rendered accordingly. Section 559.100, V.A.M.S.

The victim of the crime charged against Dr. Mucie was a 19-year-old student at Oklahoma University. Around Thanksgiving vacation in 1967, she advised her boy friend that she might be pregnant and they decided to seek an abortion because she did not wish to have the baby. She enlisted the help of her boy friend who, in turn, discussed the matter with his father in January, 1968, at Norman, Oklahoma. The father was advised of the pregnancy; that the girl, although engaged to the boy, did not wish to marry at that time, and that the girl did not want to have the baby.

On January 30, 1968, the boy's father called Dr. Mucie in Kansas City, Missouri, and told him that his son and

his fiancee had a problem in connection with her pregnancy. Dr. Mucie advised the boy's father to have the girl examined by a doctor to determine the length of the pregnancy. The father learned from his son that the onset of pregnancy was the first or middle of October, 1967, and, upon relaying this information to Dr. Mucie, was told by Dr. Mucie that "it was too late to do anything about it." This advice was relayed by the father to his son and the father was then told that the girl had not been examined. The father again told his son to have the girl examined and, subsequently, the son called his father and advised that his fiancee was then 13 to 14 weeks pregnant. This information was relayed to Dr. Mucie, who advised the son's father to have the girl come to Kansas City on the evening of February 7, 1968. The father understood that the cost would be "about four."

The father told his son of the advice received from Dr. Mucie and, on February 7, 1968, the son and his fiancee flew to Kansas City, arriving at 6:30 p.m. They went by taxi to 1924 East 31st, Kansas City, Jackson County, Missouri, where they met Dr. Mucie in his Kansas City Sinus Clinic. They waited in the lobby for ten or fifteen minutes before the girl went into the inner office. After about fifteen more minutes the girl came out with Dr. Mucie. "He said he couldn't do anything at the time, but he would take us, he had made arrangements for us to have a room at the Ambassador Hotel, and that he would take us there, and then call us about 11:30 and come pick us back up." During the interim the couple ate and attended a show.

At 11 p.m., Dr. Mucie called, and about forty minutes later arrived at the hotel to take the couple back to the Sinus Clinic. Dr. Mucie took the girl to the inner office and the boy waited in the outer office. In 20 to 30 minutes Dr. Mucie came to the outer office dressed in a surgeon's gown

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and asked the boy if he would like to pay him before he started, and the boy paid Dr. Mucie $400 in one hundred dollar bills. That was the last the boy saw of Dr. Mucie for several hours except when he came to the outer office every half hour or so to change music records.

At about 7:30 a.m., February 8, 1968, Dr. Mucie asked the boy if he wished to see the girl. He went to the inner office and saw his fiancee lying on a couch with a cover over her. Dr. Mucie said she was under sedation. He said "hello" and, although she did not speak, she smiled and seemed to move her hand. Dr. Mucie gave him some tomato juice and he went back to the outer office and slept until around 11:30 a.m.

About 11:30 a.m., he was awakened by Dr. Mucie's porter and a little later Dr. Mucie came in and "said that she had had a heart attack, and that she was in a state of shock, and they had taken her to the hospital * * * he was going to the hospital, and he would be right back to take me there * * * and about another half hour passed, and I didn't see him again, so I went to look for him. * * * I heard Dr. Mucie's voice in a far back room * * * he was laying on this bed talking on the telephone to someone. * * * He said something to the effect that was it necessary for a coroner to be called in, couldn't he just file (fill) out a doctor's certificate of death. * * * Then I went back into the office and sat down and he came in about another five or ten minutes later and told me she had died, * * * and then he said that the only possible way we could get out of this is if I said that—went along with him and said that we had been passing through Kansas City and that she had had chest pains, and that I had brought her to him for treatment * * *."

On February 8, 1968, at about 11:30 a.m., Charles William Sievers, an ambulance driver went with his attend-

ant to the Sinus Clinic and found the girl lying on a doctor's cot. Dr. Mucie advised that he detected a heartbeat and instructed them to take the girl to Osteopathic Hospital and give her oxygen enroute. They were not advised what treatment the girl had been given; they noted blood on the girl's fingers, stiffness of the arms, and the hand was in a "clawed" position. Dr. Mucie wiped some blood from between the fingers of the clawed hand. Upon lifting the patient, the attendant noted that the girl's legs did not bend down, and when in the ambulance he was unable to detect a pulse or heartbeat.

When the ambulance arrived at Osteopathic Hospital at 1:00 p.m., Dr. Richard Frederick Spavins, an osteopathic physician and surgeon, examined the girl. He found no pulse and concluded she had been dead about four hours. Dr. Spavins called Dr. Mucie and was advised by him that he had given the girl cardiac resuscitation and an injection of Vistaril, a tranquilizer, and that he had been treating her for two weeks for a heart condition. When advised by Dr. Spavins that he was going to call the coroner, Dr. Mucie told him he could and would sign the death certificate. There was no mention of abortion, uterine hemorrhage or of any treatment other than the cardiac treatment in the conversation.

The body was taken by the same ambulance to the morgue at General Hospital.

Detective James W. Smith observed the girl's body at the Osteopathic Hospital at about 1:40 p.m., February 8, 1968, and noted needle marks on her arms, buttocks, and left breast. He later took photographs of the body showing the needle marks. He was present at the autopsy performed on the body at General Hospital by Dr. Raymond J. Caffrey, a pathologist and deputy coroner, and took

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custody of part of a fetus removed from the girl's uterus and the uterus from the girl's body, both of which were put into preservative bottles.

Detectives Kenneth Riddell and Floyd Foster went to the Sinus Clinic at 6:30 or 7:00 p.m., February 8, 1968, and, upon examining a trash container, "a dumpster," also examined the fetal parts found in the dumpster at the clinic which he identified as a scapula or shoulder blade, upper part of the arm including shoulder joint, and a part of a collarbone. He was unable to fit the parts taken from the dumpster to the fetus taken from the body but they were the same parts as those missing from the fetus taken from the body and were consistent in size. Dr. Caffrey concluded that the girl's uterus had been pregnant and had been evacuated in a most unusual fashion. It was empty except for the large fetal part. There was substantial hemorrhage beneath the lining of the heart in the wall of the left ventricle indicative of the type change commonly seen in the heart of one who is dying over a period of several minutes, usually hours, from lack of oxygen, and is a fairly common accompaniment of persons who die slowly and in shock. The condition was consistent with the findings of bleeding through the uterus. An abortion after four or four-and-a-half months by dilation and curettement is dangerous because the uterus becomes very soft and the hazards of perforating the uterus with the scraping tool go up alarmingly. If it is necessary to evacuate a uterus after that time, the most generally used procedure is to open the abdomen much in the manner of a Caesarean section. Dr. Caffrey believed the girl "died from shock due to hemorrhage, due to a perforation of her uterus which was pregnant at the time it was perforated." The perforation would have to have been done by something inserted into the girl's uterus. He felt the fetus by size was con-

sistent with a fetus of four-and-a-half to five months' gestation. Dr. Caffrey was cross-examined on a line tending to show consistency between the dead girl's condition and self-induced abortion, but he felt it "highly unlikely" that even "if we are dealing with a frantic nineteen-year-old suicidal girl, that such a person could take an object and tear a fetus."

Dr. Mucie took the stand to state his own version of the case. He received a call around February 2, 3, or 4, 1968, from a man who stated he had a son in Oklahoma who had his girl friend pregnant. "He wanted to know if I knew of anyone here in Kansas City who may help her." Upon being told that the girl's last menstrual period was around the first of October, Dr. Mucie advised the man it was too late and dangerous to try to terminate a pregnancy after that time. A second call from the man a few days later advised Dr. Mucie that they had made a mistake, that the last menstrual period was the first of December. Dr. Mucie told the man that was "quite a big mistake" and to have the girl examined. A third call from the man advised they could not find a doctor to examine the girl and the man asked if he could bring the girl to Kansas City for the examination. He asked the cost of the examination and Dr. Mucie said, "About $4." The young couple came to his office on Wednesday, the day before the office closed for a day. They arrived at his office about 6:30 p.m., February 7, 1968, and he examined her to determine pregnancy and duration of pregnancy. He found the pregnancy to be of four-and-a-half or five-and-a-half months' duration and told the girl nobody could help her terminate the pregnancy. She became nervous and said it would kill her father. She said she would kill herself and Dr. Mucie gave her Vistaril to quiet her. At their request he drove the couple to the Ambassador Hotel.

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He then went to the lumberyard to get some hinges and knobs which he wanted to install at his clinic. He went to his office, did some work, and went to bed about midnight. After he went to bed he received a call from the girl informing him that she was feeling bad all over. "She was crying and nervous and hysterical." He told her to come to the office and she and the boy arrived there at 1:00 or 1:30 a.m., February 8, 1968. "She said, 'I had to do it, I just had to do it. * * *' So I placed her in a gown and routinely gave her a bimanual vaginal examination, and there I determined duration of the products of conception was beginning to protrude from the cervix itself." He then examined her with a vaginal speculum and "I noted there was a protrusion of tissue, placenta tissue and fetal parts. * * * She was in a state of aborting, and at this time immediate medical attention had to be instituted. * * * I taken her off this table and I carried her into this other room onto my surgical table, and here I placed her in stirrups and such things as that. * * * Naturally I went ahead and I sterilized the area, I washed the area with antiseptic soap and then I went in and painted that with Metaphen in order not to get any infection, and I took forceps and pulled out this bulging mass that was there." He gave Pituitrin to contract her uterus "and I noticed that the uterine wall was not clean. So the next proper step is to get a curettement, which I did, a dull curettement. * * * The reason why I done that is because the uterus was still boggy. It was not contracting as it should, and I noticed the bleeding that was occurring." He gave her penicillin by injection, Tetracyn, and Ergotrate to stop bleeding. He put her to bed around 5:00 or 6:00 a.m. and took a blood count, urinalysis, and blood pressure, all of which were normal. He rested for awhile and, about 7:00 a.m., found her hard to arouse after which he gave medications and initiated emergency and re-

suscitory procedures. He called an ambulance, told the boy his girl friend must have had a heart attack, and sent the girl to Osteopathic Hospital. He told the drivers he thought she had a faint heartbeat and called the hospital. He admitted the conversation with Dr. McCanse and that "most everything he said was more or less the truth. * * * The reason why I told him that is because (the boy) told me if there is anything we could do so it wouldn't be known she was pregnant. I said, 'Well, I will try.' So Dr. McCanse asked me if I thought there was any pregnancy there. I told him I didn't think so, and we didn't mention pregnancy, just there was no use trying to do something because there was no life there, and if I can spare humiliation of someone including her father who the way she expressed it was an individual who was not in good health and the slightest shock would have caused something greater." Dr. Mucie made no records of his treatment of the girl. He stated he did not perforate the uterus but went "in to clean up the uterus," not knowing it had been perforated. Prior to sending the girl to the hospital he redressed her to avoid its being known she was pregnant.

Dr. Richard Wasserman, a doctor of osteopathy, specializing in obstetrics and gynecology, was called by defendant. He testified in answer to questions relating to self-abortion and abortion, either induced or spontaneous, where the abortion is incomplete. He stated that in an incomplete abortion with part of the fetus outside the cervix proper procedure would be to attempt to complete evacuation of the uterus and take preventive measures against shock and control bleeding. He felt that a curettement might puncture a uterus because it is soft and cannot be seen. He knew of no curette small enough to make one thirty-second inch width tear in a uterus. He found nothing

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in the coroner's report to indicate marks on the dead girl's cervix to show insertion of a curette.

Dr. Lawrence S. Merritt, a specialist in obstetrics and gynecology in Norman, Oklahoma, testified in rebuttal that he saw the girl February 5, 1968, did a pelvic examination, and determined her to be in her twenty-first week of pregnancy, consistent with a last menstrual period around September 16, 1967.

The girl's father identified a letter from his daughter postmarked February 2, 1968, in which she stated her happiness, her engagement, described the nice person her fiance was, and her carefree college life.

Katy Monfort, the girl's roommate, saw the girl February 7, 1968, and she did not seem upset. She talked by long distance telephone with the girl that night and she heard the boy laughing in the background. The call was made by the girl to ask Katy to hand in her homework the next day and to tell her plan to be home the next day.

Section 559.100, V.A.M.S, provides in part: "Any person who, with intent to produce or promote a miscarriage or abortion * * *, uses * * * any instrument or other method or device to produce a miscarriage or abortion (unless the same is necessary to preserve her life or that of an unborn child, or if such person is not a duly licensed physician, unless the said act has been advised by a duly licensed physician to be necessary for such a purpose), shall, in event of the death of said woman * * * upon conviction be adjudged guilty of manslaughter, and punished accordingly." Under the statute, as it applies to appellant, a duly licensed physician, the offense is made out and the conviction sustained when it is shown that he used an instrument or device to cause his victim to abort when such was not necessary to preserve her life, and the pro-

cedure caused her death. The statement demonstrates evidence from which the jury could find, as it did, that Dr. Mucie, with intent to produce a felonious abortion upon his victim, used an instrument upon her for the purpose of terminating an unwanted pregnancy for her as opposed to performing such an operation as a necessary measure to preserve her life, and from which acts she died. See State v. Werbin, Mo., 345 S.W. 2d 103, 107-110[4-5].

Appellant tacitly concedes the sufficiency of evidence to sustain conviction, but contends that, even so, he should have a reversal and discharge because the statutory provision "necessary to preserve her life" is "unconstitutional and is in violation of the due process clause of the Constitution of the United States and the Constitution of the State of Missouri for the reason that it is unreasonable, discriminatory, vague and indefinite and in violation of the right of privacy." See People v. Belous, Calif., 458 P. 2d 194, and United States v. Vuitch, Nos. 1043-68 and 1044-68, U.S.D.C., D.C., November 10, 1969.

The posture of appellant's case does not present nor involve issues entitling him to a determination of his alleged constitutional question. The applicable general rule is that the constitutionality of a statute is considered in the light of the party seeking to raise the question and of the particular application of the statute to him, and a constitutional attack may not be made by one whose rights are not, or are not about to be, adversely affected by operation of the statute, and one may not urge unconstitutionality of a statute who is not harmfully affected by the particular feature of the statute alleged to be unconstitutional. 16 C.J.S., Constitutional Law, Sec. 76, pp. 226-231; State ex rel. State Board of Mediation v. Pigg, Mo., 244 S.W. 2d 75, 79[5,6]; State v. Baskowitz, Mo., 156 S.W. 945, 949-950[2]; State v. Bockstruck, Mo., 38 S.W. 317, 323. The

case against Dr. Mucie was made upon affirmative showing that the victim desired and sought an abortion to rid herself of an unwanted child and that Dr. Mucie performed the abortion for that purpose. Defendant's own testimony was to the effect that the girl came to him in an already, or incompletely, aborted state, and that his actions were not those designed to produce abortion but were to "clean up" after an already, or partially, accomplished abortion. His testimony did not go to a defense based on the exception to the statute "unless the same is necessary to preserve her life," but went, rather, to a defense (unbelieved by the jury) that he did not do it; someone else did it, and he simply tried to save her from the consequences of a botched job. Attempted support for such defense is demonstrated by the type questions put to the state's pathologist. Dr. Caffrey, upon his cross-examination, and to defendant's expert, Dr. Wasserman. The record shows further proof of the theory of defense when, in the course of colloquy between court and counsel concerning the scope of cross-examination of the state's principal witness, defense counsel represented to the court and stated, "We intend to prove that this abortion was a matter of self-inducement and this is the key crucial issue in this lawsuit. * * * We are contending this couple was so desperate after having been turned away it was self-induced. * * * Our position will be that it was self-induced." Finally, defendant's case was not submitted on any theory of acting in necessity to save life, but was submitted by Instruction No. 5, which directed that defendant could not be convicted if the jury found that when the girl went to defendant's office in the early morning of February 8, 1968, her pregnancy had already been interrupted and that defendant had not performed an act prior to that time, and by Instruction No. 6 which directed that if the jury found that defendant did not make the assault requisite to the

state's case, and after an incomplete abortion the defendant did a curettement, even though negligently done, such would not constitute a criminal offense and could not be considered in arriving at a verdict.

Thus it is demonstrated that defendant did not seek to avail himself of any rights under, or bring himself within, the exception which he alleges to contain elusive or vague language; he was not harmfully affected by that feature of the statute, and the question he would pose is thus not an issue on this appeal. See Kudish v. Board of Registration, Mass., 248 N.E. 2d 264, 266[2,3].

Appellant contends he should have received a new trial "because of the prejudicial cumulative effect of the following errors:

"(a) In allowing the admission into evidence of

"(1) The actual uterus of the deceased

"(2) The fetal parts taken from the body of the deceased

"(3) Eight photographs of the deceased's body

"(4) The fetal parts taken from the trash can at the alleged place of the abortion

"(5) A hearsay letter from the deceased to her father.

"(b) In allowing the father of the deceased to testify * * * although the rule prohibiting witnesses from being in the courtroom was in effect and he had been present during the trial.

"(c) In allowing Katy Monfort, Bert Ward and Dr. Lawrence Merritt to testify as rebuttal witnesses when all of the matters they testified to were properly part of the State's case in chief.

"(d) In allowing the State to demand the records of the defendant in violation of his right against self-incrimination."

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Appellant concedes that each of the mentioned errors "may not have been such prejudicial error to constitute a reversal, all of the errors taken as a whole * * * amounted to such prejudicial error that the defendant's right to a fair trial was violated."

Of more damage than this concession with respect to the charge of cumulative error is the failure of appellant to raise and preserve an issue of cumulative error in his motion for new trial. The same defect exists as to the error charged in connection with the admission of photographs. Since such charges were not presented to the trial court in the motion for new trial, they are not preserved for appellate review. State v. McCrady, Mo., 416 S.W. 2d 175, 177[4]; State v. Nolan, Mo., 423 S.W. 2d 815, 817-818[4].

Appellant argues that the admission in evidence of the uterus and fetal parts served no useful purpose since the cause of death was not denied or disputed, and that their admission served only to inflame the jury.

It is error to admit evidence of an inflammatory nature if it does not reasonably tend to prove or disprove a disputed fact issue, State v. Pearson, Mo., 270 S.W. 347, 351. However, other evidence will not prohibit use of demonstrative evidence which has probative value in establishing conditions and corroboration of witnesses on the issues of the case, State v. Tyson, Mo., 258 S.W. 2d 651, 654[3,4].

All of these organs were preserved in clear glass bottles in the manner of laboratory specimens. They had probative value on size and location of the rent or perforation and there was dispute whether a curette could make such a small tear; they demonstrated pregnancy and duration of pregnancy which went to corroborate the girl's wish; they showed the softened condition of the uterus

which made it more susceptible to damage by a curettement; they showed cause of death; they showed use of an instrument and force upon the uterus and fetus, and connection between actions at the clinic and ultimate findings. For rule permitting introduction of organs of a deceased, see 22A C.J.S., Criminal Law, Sec. 716, p. 991, and, in particular, for admission of a uterus, see People v. Coltrin, Calif., 55 P. 2d 1161.

The letter in question was admitted in evidence upon rebuttal to show the victim's state of mind after defendant had adduced evidence tending to depict the victim as a nervous, hysterical, and suicidal girl who, after being refused an abortion, self-induced an abortion which produced a condition that defendant only treated. The letter depicted the girl as a happy and stable person, thus showing her mental condition at the time of contacts in her behalf with Dr. Mucie, and thus rebutting the image attempted by defendant. The propriety of admitting a letter showing the state of mind of one whose state of mind has been put in issue was recognized as early as State v. Kring, 64 Mo. 591 (ultimately reversed 107 U.S. 221 on other grounds). See also State v. Porter, Mo., 111 S.W. 529; Banovitch v. Commonwealth, Va., 83 S.E. 2d 369, 375[18]; 22A C.J.S., Criminal Law, Sec. 742, pp. 1103-1104; I Wigmore on Evidence, 3d Ed., Sec. 144, p. 581. The proposition is accurately stated in State v. Prytle, N.C., 132 S.E. 785, 786[3]: "These declarations, it should be remembered, were offered, not as proof of the truth contained in such declarations, but as evidence of the fact that they were made, thus exhibiting a condition of mind, which may be shown by sounds or words, spoken or written, or by emotions displayed, or acts done. Wigmore on Evidence (2d Ed.) Secs. 143 and 1725.

"The condition of the mind is just as susceptible of proof as the condition of the stomach, but each can be

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shown to others only by some external manifestation, such as an expression on the face, or a gesture or appearance of the body, or some act or speech; and proof of any or all of these for the sole purpose of showing the state of mind or intention of the person is proof of a fact or facts from which the state of mind or intention may be inferred. The admission of such evidence is not violative of the rule against hearsay."

Appellant's citations are to be distinguished in that in State v. Benson, Mo., 142 S.W. 2d 52, the questioned evidence was not a declaration on state of mind; in State v. Cochran, Mo., 203 S.W. 2d 707, the letter writer's state of mind was not in question; and in State v. Gorden, Mo., 204 S.W. 2d 713, a hearsay statement was properly refused because it was offered as proof of its contents, the corpus delicti in an incest case.

Similar circumstances surround the victim's father as a rebuttal witness. In that capacity, he identified the letter from his daughter which was held properly admitted in discussion of the previous contention. Since the letter itself was properly admitted, it cannot be said that the court abused its discretion in permitting this witness to identify the letter, even though he sat through the trial, because his testimony was not a matter for the state's case in chief and was properly a matter of rebuttal. See State v. Lord, Mo., 286 S.W. 2d 737, 741[13]; State v. Daegele, Mo., 302 S.W. 2d 20, 24[8,9]; State v. King, Mo., 119 S.W. 2d 277, 285[16,17].

The attack on the rebuttal testimony of Katy Monfort is governed by the same rule which permitted the victim's letter in evidence because her testimony likewise went to the victim's mental condition which was put in issue by the defense. The testimony of Dr. Merritt was offered and received in rebuttal of defendant's assertions of the vic-

tim's failure to have an examination to determine her pregnancy and duration of pregnancy prior to final contact with him concerning the abortion. As such, his testimony was properly rebuttal and was not a part of the state's case in chief on the state of the victim's health.

The record does not support appellant's charge that the state was permitted to demand his medical records in violation of his right against self-incrimination.

Upon cross-examination, Dr. Mucie was asked:

"Q Do you have your records on this patient, sir? A No, I don't. Q Did you make records? A The condition she was in I had no time to make records. Q Did you make records later? A No, I didn't. * * *

"Q Do you normally make records of someone? A Yes, I do. Q Didn't you think that would be important that your medical records be intact as to what had been occurring at your office that evening? * * * A When I do my laboratory work right alongside of a microscope I have my pad and I jot down what I find and that is what I did.

"Q But even though you knew the coroner would be called in, you made no medical record? * * * A If the coroner wanted the lab reports I would have given them to him.

"Q My point is this, sir, even though you told the boy that the coroner would probably be called in you made no medical record? * * * A I just got through telling you that I did write that down. Q Where is that record? * * *

"MR. QUINN: * * * I object to the last question as a direct attempt to invade the constitutional privilege of this man against self-incrimination. * * * This was a demand for evidence * * * (and) because of the inference attempting to be made by the Prosecuting Attorney that

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there was some requirement on this man to produce some kind of evidence * * *."

This portion of the transcript has been quoted because it demonstrates that there was no demand made for defendant to produce any of his records. The questions and answers adduce only a failure to make certain records normally made and kept by a doctor of medicine; and, with respect to the laboratory notes, the objection interrupted any demand to produce that might have followed the question, "Where is that record?" Consequently, the posture of this issue is not that of a constitutional right against self-incrimination. It is, however, similar to that in People v. Emory, 13 Cal. Rptr. 889, 894[5], where failure of a physician to keep medical records contrary to normal procedure was held to raise an inference of connection with the abortion charged against him. See also People v. Wilson, Calif., 153 P. 2d 720, 724[10].

Appellant contends the verdict was excessive and reflected such passion and prejudice that it was an abuse of discretion for the trial court to decline a reduction of punishment under Section 546.430, V.A.M.S., and Criminal Rule 27.04, V.A.M.R., which provide that a trial court may reduce a jury's assessment of punishment if it is greater than it ought to be under the circumstances of the case. He concedes that in order for the supreme court to order a reduction the necessary passion and prejudice and abuse of discretion must appear clearly in the record. State v. Caffey, Mo., 365 S.W. 2d 607; State v. Laster, Mo., 293 S.W. 2d 300.

Several factors bear upon a request for reduction of punishment, but their consideration within the posture of this case does not warrant a reduction.

One such consideration is whether the penalty was the maximum provided by law, State v. McHarness, 255

S.W. 2d 826, 829[4,5], but punishment will not be deemed excessive or the result of passion and prejudice simply because it is the maximum fixed by statute, State v. Laster, supra, 293 S.W. 2d l.c. 305[3].

A second consideration is whether the crime was a brutal one, State v. Sheard, Mo., 276 S.W. 2d 191, and this is of no help to appellant because it was demonstrated that the victim died over a period of several hours by bleeding to death as a result of defendant's actions.

Another consideration is the time in which the jury reached its verdict. This jury reached its verdict after a lapse of an hour and fifteen minutes, forty minutes slower than did the jury in State v. Caffey, supra, where the court refused a reduction urged on this ground.

Another consideration stemming from State v. Caffey, supra, is whether any specific instances of improper prejudicial actions of witnesses, court, or prosecution occurred. Appellant argues this point with reference to the allegedly inflammatory incidents of trial and exhibits in evidence; but since it has been demonstrated that they were not matters of error, they do not serve to support relief on this ground. Appellant also refers to the court's admonition to counsel to relax and calm down, but this could not be an instance of prejudice bearing on the jury verdict because the record shows it occurred in chambers during defense counsel's argument on defendant's right to cross-examine a state's witness in support of the defense theory of self-abortion.

Finally, appellant seeks reduction by citation of a number of manslaughter cases in which lesser punishments than that assessed Dr. Mucie were involved. These are not persuasive on the issue of reduction in that in none of those cases did the trial or appellate court reduce a

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sentence on a manslaughter conviction under Section 559.100, supra.

Finally, appellant contends the court erred in not granting a new trial because of newly discovered evidence.

Appellant's motion for new trial was due on or before August 6, 1968. It was timely filed August 5, 1968, but contained no reference to, or allegation of, newly discovered evidence. Not until October 31, 1968, when appellant filed an "amended" motion for new trial was there any reference to newly discovered evidence. Consequently, the matter is not for review because it was not presented to the trial court by timely motion for new trial in that the amended motion was a nullity. See State v. Ash, Mo., 286 S.W. 2d 808, 812[9]; State v. Townzell, Mo., 286 S.W. 2d 785, 787[4]; State v. Miller, Mo., 368 S.W. 2d 353, 360[12,13]; and, with respect in particular to presenting alleged new evidence, see State v. Clark, Mo., 277 S.W. 2d 593, 600[7]. This ruling cannot be an undue restriction on this appellant. The record shows that he knew of the alleged new evidence in July, 1968, prior to filing his motion for new trial August 5, 1968, and made no move to present the ground to the trial court until after his time in which to file motion for new trial had expired. He thus did not exercise the diligence required of him with respect to newly discovered evidence. State v. Harris, Mo., 431 S.W. 2d 244, 247[3,4].

Judgment affirmed.

Andrew Jackson Higgins, Commissioner

Houser, C., concurs.
Welborn, C., concurs.

PER CURIAM: The foregoing opinion by Higgins, C., is adopted as the opinion of the court.

Seiler, P.J., Holman, J., and Henson, Special J., concur. Storckman, J., not sitting.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. _____

RICHARD P. MUCIE, D.O.,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

The State of Missouri, through its Attorney General, presents the following brief in opposition to the Application for Writ of Certiorari to the Supreme Court of Missouri filed by the petitioner.

OPINION IN THE COURT BELOW

1. Petitioner was tried and convicted in the Circuit Court of Jackson County, Missouri, before the Honorable Paul E. Vardeman. This decision is not reported.

2. The above case was appealed to the Supreme Court of Missouri. The Division One opinion was filed January 12, 1970, and reported as State v. Mucie, 448 S.W.2d 879.

STATEMENT OF THE CASE

As no appendix comprising the transcript on appeal is, as yet, available, no page references to a transcript or appendix can be made.

In late November, 1967, Nancy Ward, a nineteen year old co-ed at Oklahoma University, discovered she was pregnant. With the help of her fiance, Fred Landreth, and his father, they located the petitioner, an osteopath in Kansas City, Missouri. On January 30 Landreth's father contacted petitioner and informed him that his son and his fiancee had "a problem." The petitioner advised the boy's father to have the girl examined in Oklahoma to determine the duration of her pregnancy. This was done and it was determined that she was in the early second trimester. The petitioner advised Landreth's father to have the girl come to his office on February 7, 1968. A brief discussion ensued about the cost of the abortion.

On February 7, 1968, Nancy Ward and Fred Landreth flew to Kansas City arriving in the early evening, and they went directly to the "Kansas City Sinus Clinic", petitioner's place of business. Nancy Ward was taken into the inner office where she remained with the petitioner for about fifteen minutes. Petitioner then advised them that he had made an arrangement for them to stay at the Ambassador Hotel in Kansas City. He took the couple to the hotel and advised them that he would contact them about 11:30 p.m.

At approximately 11:00 p.m. petitioner called and indicated that he would pick them up in about forty minutes. He did so and drove the couple back to his office.

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Upon arriving at the office the petitioner took the girl into the inneroffice and emerged in about twenty or thirty minutes wearing a surgeon's gown. He asked Landreth if he would like to pay him before he started. Landreth produced four $100 bills and the petitioner disappeared into the back room only to emerge occasionally to change phonograph records which were continually played. Landreth remained in the waiting room throughout the night until about 7:30 a.m. on the morning of February 8.

At about 7:30 a.m. the petitioner emerged and asked Landreth if he wished to see the girl. Landreth accompanied petitioner into the inneroffice where Nancy Ward was lying on a couch under a cover. The petitioner indicated that she was under sedation. While Landreth tried to communicate with her, she was unresponsive and he returned to the waiting room and slept until around 11:30 a.m.

At approximately 11:30 a.m. Landreth was awakened and was informed by Dr. Mucie that Nancy Ward had suffered a heart attack and had to be taken to the hospital. The petitioner then returned to the back room and after about a half hour Landreth went looking for him. He overheard the petitioner stating something to the effect that "was it necessary for a coroner to be called in, couldn't he just complete a doctor's Certificate of Death?" Petitioner then emerged and told Landreth that Nancy Ward had died. Petitioner then stated that the only possible way they could get out of this was to fabricate a story about the couple passing through Kansas City and her being treated for chest pains.

Charles Sievers, an ambulance driver, was dispatched to the Kansas City Sinus Clinic around 11:30 a.m. on February 8, 1968. There they were shown by the petitioner to a girl lying on a doctor's cot. The petitioner advised the ambulance driver that he detected a heart beat and instructed Sievers to take the girl to Osteopathic Hospital. Sievers noted blood on the girls fingers and a stiffness of the arms.

He observed that Nancy Ward's hands were in a clawed position. The patient's legs would not bend, and he was unable to detect a pulse or heart beat.

Upon arrival at Osteopathic Hospital the girl was examined by Dr. Richard Spavins and Dr. Andrew McCanse. Dr. Spavins examined the body around 1:00 p.m. and concluded that Nancy Ward had been dead about four hours. When he called the petitioner, he was told that he had given the girl cardiac resuscitation and an injection of vistaril, a tranquilizer and that the petitioner had been treating her for about two weeks for a heart condition. Dr. McCanse observed the body about 2:30 p.m. and ordered an autopsy. McCanse also called the petitioner and was also told about treating her for a cardiac condition.

Dr. Raymond Caffrey, a pathologist, performed an autopsy upon the body. He noted needle punctures in the girl's arms, buttocks and side. He noted a pink staining material resembling Merthiolate on the perineum space between the legs and that the breasts were unusually tense and nipples heavily pigmented, indicative of pregnancy. The uterus was found to be substantially enlarged and softened and manifested characteristics common to pregnancy. There was a rent or tear in the uterus about one-half inch in length. There was approximately 1200 cc's (slightly more than a quart) of blood in the abdominal cavity and there were two or three ounces of blood inside the uterus. The only identifiable source of bleeding was the rent in the uterus. A scull and upper half of a fetus was still in the uterus. There was substantial hemorrhage between the lining of the heart in the wall of the left ventricle indicative of the type of change which is seen in the heart structure of a person who is dying a slow, painful death usually over a span of hours. Caffrey testified that this phenomenon was fairly common in persons who die slowly and in shock. He concluded that the

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cause of death was by bleeding to death through the hole in the uterus.

The petitioner's defense was that Nancy Ward had attempted to abort herself, or that in any rate, an incomplete abortion had begun at the time he first saw her. He described the surgical steps which he took to clean up the abortion and remove the partially aborted fetus. He further testified that at approximately dawn she became hard to arouse and he instituted emergency procedures. His defense in a nutshell was that he was attempting to rectify an abortion which had been performed by someone other than himself.

The jury did not respond to the defense and found the petitioner guilty of manslaughter by abortion. His sentence was set at 10 years in the Missouri Department of Correction.

ARGUMENT

The Supreme Court of the United States should not grant certiorari to the petitioner because:

I.

The points which the appellant raises on appeal did not form the basis of his defense in the trial, and do not represent the theory upon which he tried his case. His reliance upon the claims of unconstitutionality, while raised only in a cursory manner at the trial level, did not blossom until his appeal and we suggest that these facts are not those upon which he may properly argue those issues involving the constitutionality of the Missouri Abortion Statute.

As was noted by the Supreme Court of Missouri, the case against Dr. Mucie was made upon an affirmative showing that the victim desired and sought an abortion to rid herself of an unwanted child and that Dr. Mucie performed the abortion for that purpose. His defense, however, was based upon the premise that Nancy Ward came to him in an already, or incompletely aborted state, and that petitioner's actions were not designed to produce an abortion but were to remedy a partially accomplished abortion. In short, his defense was that someone else had aborted the fetus, and he was simply "cleaning up a botched job." Thus, his testimony did not go to a defense based upon the exception included in the Missouri abortion statute (Section 559.100, RSMo 1959) "unless the same is necessary to preserve her life",[1] but went, rather to a defense (unbelieved by the jury) that petitioner did not do it; someone else did it.

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[1] The Missouri abortion statute reads as follows:

"Any person who, with intent to produce or promote a miscarriage or abortion, advises, gives, sells or administers to a woman (whether actually pregnant or not), or who, with such intent, procures or causes her to take any drug, medicine or article, or uses upon her,

In short, the petitioner has jumped upon a bandwagon which he did not ride in the early stages of this litigation. His defense was to the effect that he did perform certain medical procedures upon the deceased, but these were not in the nature of an abortion. He claims they were only recuperative in nature, and his failure to offer evidence designed to bring him within the exception ("unless the same is necessary to preserve her life") presents no record upon which to predicate a determination of the constitutionality of that provision of the Missouri abortion statute.

We suggest the application of the reasoning adopted in United States v. National Dairy Products Corp., 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561:

> "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed (citing cases). In determining the deficiency of the notice, a statute must of necessity be examined in the light of the conduct with which a defendant is charged."

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or advises to or for her the use of, any instrument or other method or device to produce a miscarriage or abortion (unless the same is necessary to preserve her life or that of an unborn child, or if such person is not a duly licensed physician, unless the said act has been advised by a duly licensed physician to be necessary for such a purpose), shall, in event of the death of said woman, or any quick child, whereof she may be pregnant, being thereby occasioned, upon conviction be adjudged guilty of manslaughter, and punished accordingly; and in case no such death ensue such person shall be guilty of the felony of abortion, and upon conviction be punished by imprisonment in the penitentiary not less than three years nor more than five years, or by imprisonment in jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment; and any practitioner of medicine or surgery, upon conviction of any such offense, as is above defined, shall be subject to have his license or authority to practice his profession as physician or surgeon in the state of Missouri revoked by the state board of medical examiners in its discretion."

We suggest that the petitioner is now attempting to hide under the umbrella of a portion of the statute from which he never sought protection, and which had, by his own theory of defense, no application to his conduct.

Using the National Dairy Products case as a spring board the Supreme Court of New Jersey in State v. Moretti, 244 A.2d 499 (N.J. 1968), refused to adjudicate the unconstitutionality of a similar abortion statute where the appellant did not base his defense on the activities proscribed by the statute.

Petitioner cites United States v. Vuitch (Nos. 1043-68, 1044-68, 1587-69, D.C.Cir. Nov. 10, 1969). We would point out that the court was dealing with a statute of the District of Columbia which contained the following exception:

> "... necessary for the preservation of the mother's life or health ..."

The court commented that the word "health" is not defined and in fact remains so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health. Upon that premise the District of Columbia Court of Appeals found the statute unnecessarily vague. We submit that there is a vast difference between the statute in Vuitch and Section 559.100, RSMo 1959, in that the addition of the word "health" is not found in the Missouri statute and thus the fatal ambiguity of Vuitch is not present here.

Finally, we suggest that the considerations contained in Supreme Court Rule 19 do not present this case as one meriting certiorari. There are no conflicting Court of Appeals decisions. To our knowledge the only Court of Appeals decision to consider the constitutionality of a similar abortion statute is Vuitch, supra. While the questions presented may have some substance, there is no indication that a division has or will result bewteen the circuits.

CONCLUSION

Wherefore, the respondent prays that this court deny the petitioner's Application for Writ of Certiorari to the Supreme Court of Missouri.

Respectfully submitted,

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